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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT HUMBERTO ALVAREZ-MACHAIN

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QUESTION PRESENTED

Whether the federal courts may try a Mexican national kidnapped in Mexico by agents of the Drug Enforcement Administration in violation of the Extradition Treaty between the United States and Mexico, after unequivocal and repeated protests by Mexico and a formal demand for his repatriation.

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United Nations Charter, June 26, 1945, 59 Stat. 1037, T.S. No. 993 17
United Nations Convention Against Illicit Traffic

in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force for the United States November 11, 1990, T.I.A.S. No. ___, *reprinted in* 28 I.L.M. 493 (1989) 17
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Other Authorities

1 Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (2d rev. ed. 1987) 18
Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Couns. 543 (1980) . 19
F.A. Mann , *Reflections on the Prosecution of Persons Abducted in Breach of International Law,* in INTERNATIONAL LAW AT A TIME OF PERPLEXITY (407 Dinstein, Ed.) (1989) 18
Fairman, *Ker v. Illinois Revisited,* 47 Am. J. Int'l L. 678, 685 (1953) 28
FBI Authority to Seize Suspects Abroad, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Jud. Comm., 101st Cong. 1st Sess. (1989) 19
IV Moore, *International Law Digest*, 321 (1906) 39

Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3, 1881), in *Domestic Letters of the Department of State*, 1784-1906 (National Archives Microfilm Publication M40, Roll 93) 14
Letter of Secretary of State T.F. Bayard to Thomas Manning (February 26, 1887), in *Diplomatic Instructions of the Department of State*, 1801-1906, Mexico (National Archives Microfilm Publication M77, Roll 117) 14
Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 81 Am. J. Int'l Law 474, 478-80 (1990) 15
O'Higgins, *Unlawful Seizure and Illegal Extradition*, [1960] *Brit. Y. B. Int'l L.* 279 31
Preuss, *Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l L. 123 (1936) 18
Restatement (Third) of Foreign Relations Law of the United States 17, 43
Shearer, EXTRADITION IN INTERNATIONAL LAW (1971) 10
V Elliot, *Debates on the Adoption of the Federal Constitution*, 127-128, 192, 322 (1974 reprint) 36
Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L. J. 1, 24 49

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 946 F.2d 1466. The opinion of the district court (Pet.App. 4a-41a) is reported at 745 F.Supp. 599.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

TREATY INVOLVED

The extradition treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, is reprinted at J.A. 72-87 (the "Treaty").

STATEMENT

Respondent Humberto Alvarez-Machain is a Mexican citizen and a doctor residing in Guadalajara, Mexico. In April 1990 he was forcibly kidnapped by agents of the U.S. Drug Enforcement Administration (DEA) in his medical office and forcibly transported to Texas where he was taken into custody by waiting DEA officials. Respondent was charged in a sixth superseding indictment returned on January 31, 1990, with five counts relating to the kidnapping and murder of DEA Special Agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar. Dr. Alvarez-Machain, who has never been arrested before for any criminal offense, has consistently denied these allegations and maintains his innocence of these charges.

In the district court, DEA agents testified that in late 1989 and early 1990 they had contacts with persons they presumed were representing the Mexican Attorney General concerning Respondent's surrender. (Pet. Br. 2-3.) By January 1990, these DEA officials believed that they were being "set up" by their Mexican contacts and terminated the discussions. (Pet. Br. 3.) Instead, these low-level DEA officials turned to an informant, Antonio Garate-

Bustamante, and his "associates" to obtain Respondent by force without the consent of the Mexican government. (*Id.*)

There is no evidence in the record that Respondent's kidnapping was authorized by any high level official of the U.S. government. Nor has the United States initiated a request for Respondent's extradition or prosecution under the Treaty.

Mexico has vigorously protested the abduction of Dr. Alvarez-Machain throughout these proceedings (J.A. 33, 35, 67) and has never wavered from its position that Respondent's kidnapping was a violation of the Treaty and has insisted on his return to Mexico. Mexico has also stated at all times that it will honor its obligations under the Treaty with respect to Respondent. (J.A. 70-71).

On May 10, 1990, Respondent filed a motion to dismiss the indictment on the grounds of outrageous government conduct and lack of personal and subject matter jurisdiction. (Pet. App. 5a.) After an evidentiary hearing on May 25, 1990, the district court issued a memorandum order and opinion on August 10, 1990, (Pet. App. 4a-41a), in which it found that it lacked personal jurisdiction over Respondent because of the violation of the extradition treaty between the United States and Mexico. The district court ordered the government to discharge Dr. Alvarez-Machain and to repatriate him to Mexico. (Pet. App. 37a). The district court found that Respondent's abduction from Mexico was orchestrated by the DEA and its agents after negotiations with Mexican officials had broken down. (Pet. App. 24a-25a). The government has never challenged these findings in these proceedings and does not challenge them in this Court. The Ninth Circuit affirmed the district court's judgment on the authority of *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), Petition for Cert. pending, No. 91-670.

SUMMARY OF ARGUMENT

This is a case of first impression. Underlying the government's argument are two unprecedented propositions: (1) that its forcible abduction of a foreign national from his homeland, over the unequivocal protests of his government, does not violate the United States' obligations under an existing extradition treaty; and (2) that, even if it did, an individual injured by such lawless conduct could not raise this treaty violation before a court. The first distorts the clear meaning of the Treaty and makes a mockery of its purpose. The second subverts the role of treaties under the Constitution and raises the anomaly of rights without remedies.

I. The extradition treaty between Mexico and the United States provides a comprehensive and mutual framework for the rendition of persons found within their respective territories and charged with crimes specified in the Treaty itself. By its terms, the Treaty "shall apply" to the offenses for which Respondent has been charged. Article 9 of the Treaty pointedly protects the right of each party not to extradite its own citizens but to prosecute them domestically instead. Under this carefully negotiated protection afforded to both Mexican and U.S. nationals, there is no prospect of "immunity from prosecution" as the government ominously suggests. Accordingly, this case is not about whether Respondent will face the charges against him. It is only about where, by virtue of Article 9, he will stand trial.

The conclusion that the Treaty prohibits the abduction of foreign nationals from foreign territory is reinforced by its history and purpose, as well as the customary prohibition under international law on extraterritorial exercises of a state's police power. Although it is clear that the requested state can cooperate implicitly or explicitly in informal

renditions outside the Treaty framework, it hardly follows -- as the government argues -- that the requesting state can view the Treaty as optional. To the contrary, the Treaty is designed to assure mutual cooperation in the rendition of suspects and respect for national sovereignty. The United States violated the Treaty when it unilaterally circumvented this process.

II. Under *United States v. Rauscher*, 119 U.S. 407 (1886), the Treaty violation deprives the district court of jurisdiction over the defendant. This Court has consistently held that a federal court's authority is limited by the treaty obligations of the United States and will be defeated by the government's violation of express or implied provisions in those treaties.

The Treaty violation, evidenced by Mexico's on-going protest, distinguishes the authority invoked by the government. Relying on *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), the government argues that immunity from prosecution is not to be implied as a remedy for an illegal arrest. But no case involving the *Ker-Frisbie* doctrine has involved the violation of an extradition treaty, and *Ker* itself is premised on the absence of a treaty violation. *Frisbie*, involving only an interstate abduction, is utterly irrelevant to these proceedings. The rationale for the *Ker-Frisbie* doctrine -- that of assuring that the means of bringing the defendant before the court will not immunize him from prosecution -- is inapplicable in this case since, as noted, the issue is where and not whether Respondent will face charges.

The government is forced to construe *Rauscher* as an exception to the *Ker-Frisbie* doctrine. But *Rauscher* and *Ker* were decided on the same day, and they can be reconciled easily by understanding the distinctive setting in which each operates: *Rauscher* where there has been a violation of a treaty's express or implied provisions and *Ker* where there

has not. The court of appeals rightly placed this case in the *Rauscher* line.

The government's justiciability arguments are equally unpersuasive. Respondent clearly has standing to challenge the legality of these proceedings. This Court has long recognized that extradition treaties are inherently self-executing and are thus enforceable by individuals injured by their violation, regardless of whether the treaty itself provides measures for its domestic enforcement and regardless of whether the specific treaty term is explicit or implicit.

III. The court of appeals correctly concluded that repatriation was the appropriate remedy. Under both domestic and international law, repatriation is a familiar and accepted form of redress for violations of treaties or other international obligations.

IV. Nor is Respondent barred by the political question doctrine from invoking the Treaty in his own defense or in seeking repatriation. This case requires only that the court fulfill its traditional function of interpreting and enforcing the treaties of the United States as the "Supreme Law of the Land." The political question doctrine is especially inappropriate because the government itself has involved the judiciary by seeking to try Respondent and have the courts authorize his imprisonment. Having chosen to rely on the courts, the government may not at the same time prevent the courts from determining the lawfulness of their own jurisdiction or from assuring that they are not themselves complicit in a continuing violation of the Treaty.

Reversing the decision of the court of appeals would be an invitation to lawless conduct by low-level U.S. officials and pave the way for similar conduct by foreign countries against U.S. nationals.

Respondent respectfully urges this Court to reject the stunning propositions that one state's abduction of a foreign national over the protest of the territorial state can be consistent with an extradition treaty in force, and that the individual injured by such action is powerless to challenge it.

ARGUMENT

I. RESPONDENT'S FORCIBLE ABDUCTION BY U.S. AGENTS VIOLATES THE TREATY.

The lower courts interpreted the Treaty to find an implicit prohibition of the unilateral abduction of Mexican nationals from Mexican territory by U.S. agents, in the absence of acquiescence or consent by Mexico. That conclusion, which is limited in scope and unexceptional, is supported by the text, history and purpose of the Treaty, as well as the international law context in which it was drafted.

A. The Text, Structure, Purpose and Object of the Treaty Preclude Unilateral Abductions.

The starting point for analysis of the question presented is "the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). The Treaty sets forth a comprehensive framework within which criminal suspects will be rendered, in the absence of informal agreements or cooperation, from one country to the other. (J.A. 72). The Treaty's object and purpose, stated explicitly in its preamble, was "*to cooperate more closely* in the fight against crime, and, to this end, to mutually render better assistance in matters of extradition" *Id.* (emphasis added).

By the terms of Article 22, labeled "Scope of Application," the Treaty "*shall* apply to offenses specified in Article 2 committed before and after this Treaty enters into force." Art. 22(1) (emphasis supplied). Article 2 in turn, captioned "Extraditable Offenses," refers to "willful acts which fall within any of the clauses of the Appendix [including murder and kidnapping]...." Art. 2(1). The plain import of these provisions is that charges specified in Article 2 -- like those filed against Respondent -- fall within the Treaty's mandatory reach. Analogous language in the Hague Service Convention was held mandatory in *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 699 (1988).[1]

Other provisions further discredit the Government's portrayal of the Treaty as inapplicable to the circumstances of this case. Under Article 1, the parties agree to mutually extradite persons covered by the terms of the Treaty, including those accused of kidnapping. Article 1(2) specifically governs the delivery of persons "for an offense committed outside the territory of the requesting party." The Treaty imposes a wide variety of limitations on the obligations to extradite and on the duties of the requesting party once extradition is granted under the Treaty.[2]

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[1]In *Schlunk*, the Court went on to find that the service on a foreign parent through its wholly-owned U.S. subsidiary was not service "abroad" within the meaning of the Convention. 486 U.S. at 707-08. But there is no analogous text in the Extradition Treaty that can be interpreted to allow extraterritorial abduction of foreign nationals by the government, as occurred in this case.

[2]For example, extradition will not be granted for "political" offenses (Article 5(1)), for "purely military" offenses (Article 5(3)), when the person has been tried for the offense by the requested party (Article 6), or if the offense is barred by lapse

These limitations on the rendition of nationals and the mandatory language in which they are framed make the government's arguments in this case implausible. Clearly, Mexico and the United States did not create an extradition treaty, with a carefully-negotiated package of limitations and procedural protections, only to allow either party to circumvent it at whim by abducting a suspect from the other's territory.

A critical provision for the purposes of this case is Article 9, which reflects an agreement between the United States and Mexico protecting the right of each party not to have its nationals prosecuted in the other country, so long as the case is submitted for prosecution if extradition is denied. Article 9 provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

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of time (Article 7). (J.A. 74-75). Article 8 permits extradition to be refused absent assurances that the death penalty will not be imposed or executed. There would be no point to these limitations if they could be bypassed by state-sponsored abduction.

Such a restriction in Article 9 reflects an agreement between the two contracting sovereigns: Each nation is given the right to insist that charges be brought against a national of the other, in exchange for that nation's right to choose where such proceedings will be instituted.[3]

The U.S. government was fully aware of the nature of the agreement reached in Article 9 of the Treaty, although it inexplicably ignores paragraph 2 of Article 9 altogether in its brief. The Presidential Message accompanying the Treaty expressly recognized that:

> The new U.S.-Mexico treaty would permit the U.S. to extradite its own citizens, as does the old treaty. Mexican law, however, prohibits the extradition of Mexican nationals. The treaty thus obliges the requested state, *if it does not extradite its own nationals, to submit the case to its competent authorities for a decision as to prosecution, provided that state has jurisdiction over the offense.*

Presidential Message, Extradition Treaty Between the United States and Mexico--Changes in the New Treaty at 19 (emphasis added). Thus, the United States understood from the outset that Mexico has the right under the Treaty to insist that Respondent be tried in Mexico and *not* in the United States.

The United States-Mexico Treaty is one of a small number of extradition treaties to which the United States

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[3]*See generally*, Shearer, EXTRADITION IN INTERNATIONAL LAW 94-118 (1971).

is a party which include such an obligation.[4] Mexico has consistently affirmed its willingness to abide by its obligations to submit the case against Respondent for prosecution under Article 9(2), (J.A. 70-71), and the government of the United States does not dispute the sincerity of this representation. Thus, an extradition request in this case would not be futile; the United States would get exactly what it bargained for.

Viewing forcible abduction of Mexican nationals as a viable alternative to extradition proceedings, the government completely undermines the basic purpose of the Treaty by unilaterally altering the terms of its agreement with Mexico. Under basic rules governing treaty interpretation, this cannot be done. *See, e.g., New York Indians v. United States,* 170 U.S. 1, 23 (1898).

Moreover, the Treaty cannot be explained simply as an optional tool to be used only when the parties agree on the rendition of a fugitive. Petitioner provides a strained and unconvincing rationale for the negotiation of extradition treaties as emanating solely from a desire by states to impose additional obligations upon themselves to render up fugitives to requesting foreign governments (Pet. Br. 21).

But, a primary motivation governments have in negotiating extradition treaties is their desire to acquire a legal basis to *demand* the rendition of fugitives. Moreover, it is precisely because abduction of criminal suspects from another country is so clearly prohibited in international law, and because there is no international duty to extradite absent a treaty, that extradition treaties are necessary.

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[4]The U.S. extradition treaties which have provisions similar to Article 9 are with Argentina, Costa Rica, Denmark, Finland, Germany, Jamaica, Norway, Paraguay, Sweden, Thailand and Turkey.

Where Mexico and the United States agree to render criminal suspects informally, the Treaty provisions are, of course, superfluous.[5] It is only and precisely when such informal agreements are not possible that the Treaty is required and comprehensively governs the manner in which suspects may be rendered. In these circumstances, the carefully-negotiated limitations apply.[6]

Significantly, the Treaty is reciprocal, and protects all Americans from abduction just as it does Mexicans. The government's reading is all the more implausible and

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[5]States may rely on other sovereign powers to consent to the informal rendition of a criminal suspect. *See, e.g., United States v. Sobell,* 244 F.2d 520, 524-25 (2d Cir.), *cert. den.*, 355 U.S. 873 (1957) (no Mexican protest to abduction in Mexico by Mexican Security Police of U.S. citizen charged by the U.S. Government with espionage); *see also Stevenson v. United States,* 381 F.2d 142, 144 (9th Cir. 1967) ("The appellants were deported by Mexican immigration authorities as undesirable aliens found in Mexico under suspicious circumstances.").

[6]The government claims that the Treaty is "not a general compact for the protection of territorial rights." (Pet. Br. 9). Respondent does not argue to the contrary. However, the Treaty does recognize certain territorial rights. For example, Article 4 of the Treaty specifically recognizes the territorial jurisdiction of the states parties in the implementation of the Treaty. Concerns relating to territorial sovereignty are also explicitly referred to in Article 20, Section 2, which provides that "the authorities of the Transit State shall be in charge of the custody of the extradited person while that person is in its territory." The Treaty would become meaningless if the underlying premise of mutual respect for the territorial sovereignty of both countries were ignored in the rendition of criminal suspects.

troubling, since it would allow Mexico to forcibly abduct Americans from United States territory, without requesting extradition. *Cf. Boos v. Barry*, 485 U.S. 312, 323 (1988) (considerations of reciprocity enhance importance of complying with international obligations).

B. The Historical Background of the Treaty Supports The Interpretation Urged by the Government of Mexico and Respondent.

The United States and Mexico have entered into a series of extradition treaties dating back to 1862. Thus for 130 years the United States and Mexico have found it important to have a treaty governing the exchange of criminal suspects.[7] In that time, the United States government has never, until this case, asserted the right to abduct Mexican citizens from the territory of Mexico without Mexico's consent.[8]

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[7]Significantly, the United States has no extradition treaty with many countries. This category includes Libya, Syria, Iran, Lebanon, Jordan, Yemen, Tunisia, Algeria, North Korea, the Peoples Republic of China, Viet Nam, Afghanistan, Kampuchea, Kuwait, Morocco, Ethiopia, Somalia, Sudan, and Mozambique. Abductions of the nationals of these countries, for example in the context of persons sought for terrorist attacks on U.S. citizens abroad, would present legal issues distinct from the issues presented in this case.

[8]Some of the early history of this treaty is recounted in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11-17 (1936). Indeed, under the first extradition treaty with Mexico, Secretary of State Blaine came to the conclusion that the United States was precluded from requesting the surrender of Mexican citizens under the treaty. (*Id.* at 16).

Indeed, the understanding from the early days of extradition treaties between the United States and Mexico was that unconsented abduction was not an acceptable alternative to extradition. Secretary of State James Blaine emphasized in 1881 that "[t]he treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any case, to deviate from those forms or arbitrarily abduct from the territory of one party a person charged with crime, for trial within the jurisdiction of the other." Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3, 1881), in *Domestic Letters of the Department of State*, 1784-1906 (National Archives Microfilm Publication M40, Roll 93).[9]

In 1887, after *Ker* was decided, Secretary of State Thomas Bayard maintained that transborder abductions violated the same extradition treaty in the context of the abduction of Francisco Arresures, who was seized in Texas by three deputy sheriffs and a Mexican police officer and brought to Mexico where he was killed in custody. Bayard complained that Arresures' return to Mexico was "obtained not in accordance with, but in fraud of existing treaties." Letter of Secretary of State T.F. Bayard to Thomas Manning (February 26, 1887), in *Diplomatic Instructions of*

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[9]The Government seeks to avoid the obvious implications of this letter by noting that it was written before *Ker v. Illinois*; however, the letter reflects clearly that the State Department early in the extradition relations between the United States and Mexico understood the extradition treaty to prohibit state-sponsored abductions. Moreover, by its terms and as interpreted, *Ker* does not apply when an extradition treaty is violated. *See*, § II, *infra*. Thus, the original understanding of the Treaty partners was untouched by *Ker*.

the Department of State, 1801-1906, Mexico (National Archives Microfilm Publication M77, Roll 117).[10]

Neither the United States nor Mexico has ever, until now, stated that it had the right to abduct nationals of the other country from that country's territory. Secretary of State Blaine's understanding that forcible abductions could not be used to circumvent the extradition treaty between the United States and Mexico has not been challenged in the years since, and there is no record that the United States asserted such a right in any of the negotiations leading up to the current Treaty.

Indeed, in the years just before the existing Treaty was adopted, the Congress placed stringent prohibitions on the kind of DEA action at issue in this case.[11] These

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[10]Contrary to the government's assertion, (Pet. Br. 28-29 n. 23), neither the 1906 *Martinez* incident, nor the decision in *Ex Parte Lopez*, 6 F.Supp. 342 (S.D. Tex. 1934), offers support for its interpretation of the Treaty. Neither case involved a treaty violation because no government agent appears to have been involved in the abductions. In both cases, therefore, the rule in *Ker* did apply. *See* § IIB, *infra*.

[11]In 1976, Congress specifically prohibited the DEA from taking part in arrests of foreign nationals in the sovereign territory of other governments. 22 U.S.C. § 2291(c), Foreign Assistance Act of 1961 as amended, § 481(c), *as enacted by* § 504(b) of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 764 ("Mansfield Amendment"). This action was a specific response to concerns over DEA activities abroad. Sen. Comm. on For. Rels., Internal Security Assistance And Arms Expert Control Act, Report On S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 1378. *See generally*, Lowenfeld, *U.S. Law Enforcement Abroad:*

restrictions could only have given Mexico confidence that the Treaty was negotiated with such limitations as a fundamental backdrop to the agreement.

C. The Government's New Interpretation of the Treaty is Inconsistent With International Law.

The government's characterization of the Treaty as optional is especially implausible in light of the clear and long-standing limitations on extraterritorial arrests in international law. In the absence of some manifestation of consent, it is a violation of international law for one government to exercise its police power in the territory of another state. These limitations are part of the fabric of our extradition relations with Mexico, and the Treaty must be interpreted accordingly. *See Rauscher, supra* (Webster-Ashburton Treaty interpreted to include customary law doctrine of specialty). This well-established customary principle forecloses the government's interpretation of the Treaty.[12]

The Constitution and International Law, Continued, 81 Am. J. Int'l Law 474, 478-80 (1990).

[12]Article 31(3)(c) of the Vienna Convention on the Law of Treaties *adopted*, May 22, 1969, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 8 INT'L LEG. MAT. 674 (1969), requires that, in interpreting a treaty, "there shall be taken into account ... any relevant rules of international law applicable in the relations between the parties." The Executive Branch has stated that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong. 1st Sess. (1971) at 1.

Every nation enjoys "necessarily exclusive and absolute" jurisdiction within its own territory. *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 136 (1812). "A states's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Restatement (Third) of Foreign Relations Law of the United States,* § 432 (2).

The international authorities in support of this principle are consistent, compelling, and ancient. In its seminal decision in *S.S. Lotus (Turkey v. France)*, the Permanent Court of International Justice summarized centuries of customary law by emphasizing that "the *first and foremost* restriction imposed by international law upon a State is that -- failing the existence of a permissive rule to the contrary -- it may not exercise its powers in any form in the territory of another State."[13]

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[13][1927] P.C.I.J. (ser. A.) No. 10 at 18. (Emphasis added). This doctrine of territorial integrity is protected by various international agreements such as the United Nations Charter, June 26, 1945, 59 Stat. 1037, T.S. No. 993, at Article 2 (4), and the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, at Article 20. The Government resists the cumulative and evidentiary effect of these provisions by denying what no party asserts. (Pet. Br. 5, 32-4). It is not necessary to find that these conventions offer independent grounds for invalidating extraterritorial abductions, only that they provide powerful evidence of the customary understanding with which the Treaty was negotiated. To the same effect, *see* the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force for the United States November 11, 1990,

The practice of states reaffirms this basic principle.[14] In the *Eichmann* case, for example, when Israeli agents abducted the former Nazi from Argentina and brought him to Israel, the U.N. Security Council adopted, without

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T.I.A.S. No. ____, *reprinted in* 28 I.L.M. 493 (1989), art.2(2) and (3).

Expert commentary is also relevant in determining the content of the law of nations, *The Paquete Habana*, 175 U.S. 677, 700 (1900), and it uniformly recognizes the illegality of extraterritorial arrests without the consent of the affected state. *See, e.g.*, F.A. Mann , *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY (407 Dinstein, Ed.) (1989).

[14]*See generally* 1 Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE; ch. V., § 5.4 at 235-37 (2d rev. ed. 1987) (collecting cases); Preuss, *Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l L. 123 (1936); *see also In re Vincenti* (1920), *in* 1 G. Hackworth, *Digest of International Law* 624 (1940) (U.S. released a U.S. citizen seized in the British West Indies, when Great Britain protested); *In re Jolis*, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes) (holding that the arrest of a Belgian by French police in Belgium was "a nullity," because the Belgian government lodged an official protest with the French government); *Casablanca Case (Fr. v. Germ.)*, Hague Ct. Rep. 110 (Scott ed. 1916) (holding, in regard to German deserters from the French Foreign Legion seized by the French in 1909, that it "was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate"). *But cf. Re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964) (repatriation not required if territorial state fails to protest abduction before trial.)

opposition, a resolution condemning the kidnapping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law ...." U.N. Doc. S/4349 (1960). The acknowledged violation of international law was redressed only when Argentina and Israel resolved to consider the incident closed.[15]

In settings other than this case, the Executive Branch has faithfully recognized that extraterritorial abductions by government agents violate international law. The former Legal Advisor to the Department of State expressly testified that "[f]orcible abductions from a foreign state clearly violate this principle" of sovereignty and that "the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity."[16] Nothing in Petitioner's brief qualifies or

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[15] *In re Eichmann*, 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 208-14 (1961).

[16] *FBI Authority to Seize Suspects Abroad, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Jud. Comm.*, 101st Cong. 1st Sess. (1989) ("Oversight Hearings"), at 31 (Sofaer statement). The Office of Legal Counsel within the Department of Justice, addressing a hypothetical strikingly parallel to the case at bar, concluded that "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law." *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. Off. Legal Couns. 543 (1980). Even though the Department of Justice subsequently withdrew this letter and issued an unpublished replacement, there is no suggestion that the Department of Justice or any other executive department has repudiated this analysis of customary law. *See Oversight Hearings, supra*, at 20-21 (Barr statement), 34-37

alters this traditional view. There is no doubt that the United States would consider it a fundamental violation of its own territorial sovereignty if Mexico attempted to abduct a U.S. citizen from our territory[17] -- if, for example, the Mexican government responded by kidnapping the DEA agents who kidnapped Respondent. An obvious purpose of the Treaty is to discourage lawless self-help, no matter how justified the proclaimed objective of an abduction may be, or how impatient low-level DEA officials may be with this country's international obligations.[18]

(Sofaer statement).

[17]Indeed, when the Soviet Union attempted to kidnap a Soviet citizen within the territory of the United States, the State Department, drawing on the customary understanding among states, declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 DEP'T OF STATE BULL. 251 (1948).

[18]Recent treaties between the United States and Mexico reaffirm the customary prohibition against extraterritorial abduction. In 1987 and 1989, the parties agreed to cooperate closely in matters of legal assistance and drug law enforcement. The two nations were careful to state that their enhanced relationship should not be interpreted as a consent to abduction from one another's territory. Treaty of Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, done in Mexico City, December 9, 1987, entered into force for the United States, May 3, 1991, T.I.A.S. No. ___, *reprinted in* 27 I.L.M. 443 (1988), art. 1(2); Agreement between the United States of America and the United Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, done in Mexico City,

As shown above, treaties must be interpreted in light of relevant rules of public international law. In this case, that interpretive mandate means that the presumption must be that extraterritorial abductions are illegal unless they are specifically authorized, not that they are presumptively authorized unless explicitly prohibited. Given this customary law backdrop to the Treaty, there was no reason for Mexico to insist on a specific treaty provision explicitly prohibiting the United States from abducting Mexican nationals from Mexican territory.

The fact that the Executive Branch has now offered a different interpretation of the Treaty for the purposes of this litigation does not alter the international principles at stake. Although the government's construction of a treaty may be entitled to deference, *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176 (1982), this Court has frequently refused to adopt executive interpretations it considered irreconcilable with the text or purpose of the treaty itself. *See, e.g., Rauscher, supra; Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1933); and Valentine, supra.*[19]

February 23, 1989, entered into force, July 30, 1990, T.I.A.S. No. ___, *reprinted in* 29 I.L.M. 58 (1990), art. I(3). No similar provision was required in the extradition treaty because its object was precisely to specify the ways in which criminal suspects could be rendered.

[19]This is equally true outside the context of extradition treaties. *See, e.g., Chan v. Korean Airlines*, 490 U.S. 122 (1989) (government's interpretation of the liability limitations laid out in the Warsaw Convention rejected); *The Amiable Isabella*, 19 U.S. 1 (1821) (government's unilateral interpretation of the Spanish Treaty of 1795 with respect to passports rejected); *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1 (1986)

Deference to the executive's interpretation may be especially appropriate when the *other* States parties to the treaty concur in the interpretation.[20] In such circumstances, the U.S. government's views may generally be said to comport with the international "meeting of the minds" that gave life to the treaty. But where, as here, the other party to a bilateral treaty specifically disputes the current administration's interpretation, deference is less justified. The basic meaning of a treaty should not be allowed to change from year to year, or administration to administration.

II. THE DISTRICT COURT LACKED AUTHORITY TO TRY RESPONDENT BECAUSE OF THE VIOLATION OF THE TREATY.

A. Under Well Established Precedents The Lower Courts Properly Declined To Exercise Jurisdiction Over Respondent Because of the Treaty Violation.

This Court's decisions in *United States v. Rauscher,* 119 U.S. 407, 425 (1886), *Ford v. United States,* 273 U.S. 593 (1927), and *Cook v. United States,* 288 U.S. 102 (1933), fully support the judgment below. These cases stand for

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(government's interpretation of aviation treaty rejected.)

[20]*See, e.g., O'Connor v. United States,* 479 U.S. 27 (1986) (Panama did not challenge U.S. government's interpretation of Panama Canal Treaty); *Sumitomo, supra* (Japan explicitly supported the U.S. government's interpretation of the Friendship, Commerce, and Navigation treaty between the United States and Japan).

the proposition that a treaty obligation may restrict the jurisdiction of the federal courts to try a criminal defendant.[21]

In *Rauscher*, the U.S. obtained the extradition of a sailor, William Rauscher, on a charge of murder of another crew member. Rauscher was then tried not for murder but for cruel and unusual punishment. Rauscher claimed that he was exempt from prosecution for any charge but murder under the extradition treaty. This Court agreed, holding that the internationally accepted doctrine of specialty must be assumed to be part of the 1842 Webster-Ashburton Treaty between the United States and Britain, and therefore that a defendant could be tried only for a crime for which he had been extradited. In other words, contrary to the government's sweeping assertion, the manner in which a defendant is brought before a court plainly affects the court's jurisdiction.

Rauscher does not sound this principle alone. Indeed, the Court reaffirmed it in *Cook* and *Ford*. In *Cook*, the defendant had been assessed a fine after his vessel had been seized by American officials. The vessel, however, had been caught outside the permissible zone defined by a treaty between the United States and Great Britain. The Court found that the treaty violation defeated the jurisdiction of United States courts over the vessel, stating that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of

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[21]As explained in *Rauscher*, 119 U.S. at 433, the treaty violation acts as a temporary limit on the trial court's personal jurisdiction over defendant, not barring trial "at some future time, when the defendant may have been properly brought within the jurisdiction of the court...." Respondent uses the term "jurisdiction" in this sense in this brief.

the Treaty." 288 U.S. at 121-22. Thus, where the government seizure is in violation of a treaty, there can be no jurisdiction over the seized person or thing because "the government itself lacked power to seize." *Id.* at 121; *see also Ford*, 273 U.S. at 606 (whether the seizure violated the treaty "affected the right of the court to hold the [defendants'] persons for trial").

The government attempts to limit the scope of *Rauscher*'s holding, arguing that it applies only where there is "both a clear violation of a treaty . . . and a clear intention in the treaty . . . to provide for termination of the prosecution as a remedy." (Pet. Br. at 17). This is simply not true. In *Rauscher*, no language in the treaty between the United States and Great-Britain indicated that the rule of specialty applied, or even peripherally alluded to the consequences of a violation on subsequent judicial proceedings. 119 U.S. at 429. Nevertheless, this Court reviewed the international law authorities of the day and found that the doctrine of specialty must be construed as part of the 1842 treaty. As the Court emphasized, "[t]he entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." *Id.*

The Court adopted the view that the absence of an explicit jurisdictional limitation in the Treaty could not leave the government free to try Rauscher for any crime it chose. The Court stated:

> The opposite view has been attempted to be maintained in this country, upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or

> fraud, or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself.

Id. at 430. Thus, the *Rauscher* Court rejected the precise argument made by the government in this appeal.

Likewise, the agreements in *Ford* and *Cook* did nothing more than reiterate the right of the United States to make seizures of illegal cargoes within the traditional three mile territorial sea and provided that Great Britain would not protest if seizures were also made within one hour's coasting distance.[22] Nowhere in the treaties were possible jurisdictional repercussions considered. Still, the Court made it clear that a violation of the treaty's implied provisions would prevent judicial proceedings and, of course, the infliction of criminal penalties. The Court

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[22]Similar to the government's claim in this case, the government argued that because the treaty did not contain explicit language obliging the U.S. not to seize ships beyond the one hour range, the treaty had not been violated. The Court rejected this myopic view and found that the language, structure and history of the treaty reflected the desire of both parties to deal with all searches and seizures of British vessels suspected of smuggling liquors beyond U.S. territorial limits. *Cook*, 288 U.S. at 111-12; *Ford*, 273 U.S. at 606. In other words, as in this case, the absence of a prohibition that the parties would have found it unnecessary to include did not mean that the prohibition could be ignored.

found such consequences to be implicit in the "purpose and effect of the Treaty." *Cook*, 288 U.S. at 121-22 (citing *Rauscher*); *Ford*, 273 U.S. at 606.

In short, the government repeatedly mischaracterizes the treaties involved in those three cases, stating that they contained explicit provisions conferring immunity from prosecution where persons or property were seized in violation of their terms. (Pet. Br. 19-20). In fact, like the treaty at issue in this case, they simply regulated the means by which a defendant can be brought before a court, be it via extradition or seizure. The jurisdictional effects were deemed to follow automatically.

The basic principle to be derived from *Rauscher*, *Cook*, and *Ford* is that the courts must decline to exercise jurisdiction over individuals prosecuted in violation of our treaty obligations. If the government's proposed requirements of explicit prohibitions and explicit remedies were accepted, each of these cases would be overruled.[23]

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[23]The Government offers two other reasons for distinguishing *Rauscher*. First, the Government argues that "*Rauscher* emphasized that its construction of extradition treaties 'did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties'." (Pet. Br. 19 n.14). Yet this merely supports Respondent's view that the Treaty must be read in the context of the clear international law prohibiting state-sponsored kidnapping.

Second, the government argues that the existence of Rev. Stat. §§ 5272 and 5275 was central to the decision in *Rauscher* (Pet. Br. 18 n. 13, 19 n. 14). Justice Miller's majority opinion referred to these statutes as additional support for a decision based on the Webster-Ashburton Treaty. *Rauscher*, 119 U.S. at 430. However, this Court later made it clear that *Rauscher* was based on the treaty. *See Johnson v. Browne*, 205 U.S. 309, 318

B. The Ker-Frisbie Doctrine Is Inapplicable.

By invoking the *Ker-Frisbie* doctrine, the government has relied exclusively on cases in which no treaty violation had occurred, or which involved strictly interstate relations within the United States. These precedents are simply inapplicable here. Where a defendant is brought before a court in violation of a treaty, jurisdiction will be defeated.

Moreover, the linchpin of the government's view of the *Ker-Frisbie* doctrine is that it reflects the judgment "that foreclosing prosecution is too high a price for society to pay for an unlawful arrest." (Pet. Br. 8, 17). But this rationale has no application in this case, because under Article 9 (2) the case against Respondent will be submitted for prosecution in Mexico, if the United States requests extradition and it is denied. This is precisely the right the United States obtained in negotiating the Treaty.

1. Ker v. Illinois Does Not Govern This Case.

The government argues that *Ker v. Illinois* established a sweeping principle -- namely that, barring exceptional circumstances, a court will not inquire into the means by which an individual has been brought before it. The government attempts to portray *Rauscher* as an "exception" to the more general rule articulated in *Ker*. There is no support in precedent or logic for this characterization.

(1907) ("The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.")

Rauscher is no more an exception to *Ker* than *Ker* is to *Rauscher*; rather, each one applies in a distinctive setting: *Rauscher* where there has been a violation of a treaty's express or implied provisions, and *Ker* where there has not.

In *Ker*, a U.S. citizen who had fled to Peru to escape embezzlement charges was forcibly returned to the United States by a private security guard. Though the guard carried official extradition papers within the framework of the 1870 extradition treaty between the United States and Peru, the seizure was made outside of formal extradition procedures. That the abduction did not violate the extradition treaty is evidenced first by the absence of any U.S. involvement in the kidnapping, and second by the absence of any protest by Peru. *See Ker*, 119 U.S. at 438, 441-43 (Ker's abduction "was a clear case of kidnapping within the domain of Peru, without any pretense of authority under the Treaty or from the government of the United States"); *Ker v. Illinois*, 110 Ill. 627, 640 (1884) (noting absence of protest).[24] The former negates any notion that the U.S. government might have breached its obligations. The latter means that Peru's acquiescence must be inferred,[25] transforming Ker's abduction into a consensual informal rendition. At most, then, the private security guard's actions violated Peru's laws.

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[24]At the time of the kidnapping, Peru was partially under Chilean occupation. Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678, 685 (1953). The Chilean government also filed no protest.

[25]Ker was a U.S. citizen who fled Illinois to avoid pending criminal charges. In such circumstances, acquiesence or consent would be highly likely and no bar to renditions of nationals would apply.

Accordingly, the right invoked by Ker was not Peru's right as a sovereign, but rather his own alleged "right of asylum" under the treaty. It is this purported right that the Court easily rejected. Indeed, as the Court recognized, Peru had the sovereign prerogative to deport Ker if it so chose. 119 U.S. at 424. Similarly, Peru had the right to consent, explicitly or silently, to the kidnapping of Ker from its territory -- a right Peru exercised by silence in that case.

In *Ford*, the Court expressly found *Ker* inapplicable to claimed violations of a treaty. The Court stated:

> The Solicitor General [asserts], on the authority of *Ker v. Illinois* . . ., that an illegal seizure would not have ousted the jurisdiction of the court to try the defendants. But the *Ker* case does not apply here. It related to a trial in a state court, and this court found that the illegal seizure of the defendant therein violated neither the federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their [sic] trial after alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different.

273 U.S. at 605-06.

Two basic elements are therefore required to find that a treaty has been violated and that the violation divests a court of its jurisdiction: (1) abduction by individuals clothed with the authority of the prosecuting state; and (2) protest by the state where the kidnapping occurred. Absent one of these elements, a court will find that there has been no treaty violation, either because the country trying the suspect has committed no illegitimate sovereign act, or because the non-protesting nation will be deemed to have acquiesced in the rendition.

Consistent with these requirements, every lower court case adhering to *Ker* in the context of an international abduction has exhibited one or more of the following factors:[26] (1) The absence of an official protest by the government of the country from whom the suspect was abducted, (2) the direct involvement or consent of the foreign government in the rendition of the suspect to the United States; or (3) the absence of direct involvement of the United States government in the abduction.[27] Like *Ker*, therefore, these cases are silent as to the governing principle in this case and cannot support the government's assumption that *Ker* applies in such circumstances. While the broad language in some of these cases does evidence a self-imposed reluctance to inquire into how a defendant

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[26]The lower court cases are collected in *Verdugo-Urquidez*, 939 F.2d at 1349 n. 9. & 1353 n. 12.

[27]Some cases lack more than one critical element. Thus, in *State v. Brewster*, 7 Vt. 118 (1835), a case the government describes as one of *Ker*'s forerunners, (Pet. Br. 14), no treaty was in place, and there was no suggestion that Canada objected to the forcible removal. *Id.*, at 120-21.

The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102, 104 (1815), relied upon by the government (Pet. Br. 14 n.8), did not erect an absolute bar to the adjudication of the lawfulness of the seizure of vessels in violation of international law. This Court recognized in *The Paquete Habana, supra*, that the seizure of a neutral fishing vessel in violation of customary international law was justiciable at the behest of the injured owners. Further, U.S. courts would order the return of the seized vessel and cargo in prize cases where the neutral state, in whose territory the seizure had occurred, officially intervened to assert the customary law violation. *See The Anne*, 16 U.S. (3 Wheat.) 435 (1818); *The Adela*, 73 U.S. (6 Wall.) 266 (1868).

has been brought before the court, violations of international treaties were not presented in any of these cases.[28]

The government asserts that "[i]t is telling that . . . no decision has previously held that an extradition treaty prohibits arrests made outside the treaty terms." (Pet. Br. 27). But it is equally telling that no decision has held that the government may do what these DEA agents did here. And the most telling fact of all is that the United States government has never before engaged in such egregious conduct and asked the courts to ratify it.

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[28]The international cases cited by Petitioner appear to be distinguisable for the same reason. In neither *Ex Parte Scott*, 9 B. & C. 446 (1829), nor *R. v. Lopez and Sattler*, 1 Dearsly & Bell's Crown Cases 525 (1858), is there any mention of a treaty or protest. Indeed, in *Lopez, id.* at 547, foreign authorities assisted in the defendant's arrest and the crime at issue had been committed subsequent to his abduction on an English ship that was "part of the territory of England." *Id*; *see also*, O'Higgins, *Unlawful Seizure and Illegal Extradition*, [1960] *Brit. Y. B. Int'l L.* 279. Cases after *Ker* are to the same effect. In *In re Eichmann, supra*, Argentina had withdrawn its protest *prior* to the time of trial. *See also, Afouneh v. Attorney-General*, 4 Ann. Dig. 328 (Palestine S.Ct. 1942) (acquiescence in abduction); *Ex Parte Elliott*, 1 All E.R. 373 (K.B. 1949) (acquiescence); *Re Karoly*, 4 Ann. Dig. 345 (same); *The Savarkar Case* (Feb. 24, 1911), *reprinted in*, Hague Court Reports 275 (Scott Ed. 1916) (same). Although language in *In Re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964), might provide some support for the government's view, the facts in that case do not indicate that a timely protest was lodged or that the French government participated in the abduction.

2. Cases Involving Domestic Abductions Are Inapplicable To This Case.

The government also heavily relies on the *Frisbie* line of cases for its broad proposition that the federal courts may not consider the treaty violation at issue here. (Pet. Br. 15-17). But *Frisbie*, its progenitors, and its progeny, all involve instances of interstate abductions in which neither a treaty, nor international law generally, was even peripherally involved. Plainly, these decisions have no bearing on cases of international kidnapping in which extradition treaties between sovereign nations play a central part and serve to establish limitations on the power of one nation to try a criminal suspect who is a national and resident of the other.

Principles of domestic extradition by contrast are governed by Article IV of the Constitution and the Extradition Act, 18 U.S.C. § 3182, neither of which was "used to express the law of extradition as usually prevailing among independent nations." *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132 (1917). Far from embodying principles of national sovereignty, their design was "in effect, to eliminate, for this purpose, the boundaries of the states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land." *Id.* at 133; *see also Nevada v. Hall*, 440 U.S. 410, 425 (1979) (extradition clause "demonstrate[s] that ours is not a union of 50 wholly independent sovereigns.")

States of the Union lack the discretion not to surrender one of their nationals. Whatever else might be argued, a suspected criminal who has been forcibly abducted into a state cannot complain that the Extradition Clause divested either the state or the court of its authority. Therefore, the line of cases dealing with domestic kidnappings provides no guidance to determine the effect of a violation

of an extradition treaty binding the United States and a sovereign nation.

Frisbie demonstrates the point. *Frisbie* involved the kidnapping by Michigan police of a murder suspect living in Illinois. The Supreme Court rejected a due process claim based on this abduction and also a claim based on the Federal Kidnapping Act. The *Frisbie* case did not deal with claimed treaty violations and thus does not undermine the application of *Rauscher, Ford* or *Cook*. *See United States v. Postal,* 589 F.2d 862, 875 n.19 (5th Cir), *cert. den.*, 444 U.S. 832 (1979).

This Court has long recognized what the government ignores here: the difference between international and interstate relations. In *Lascelles v. Georgia,* 148 U.S. 537 (1893), this Court declined to extend *Rauscher* to transactions between sister states. To hold otherwise would be to assume "that the states of the Union are independent governments having the full prerogatives and powers of nations..." *Id.* at 541-42. The Court went on:

> *The case of [Rauscher] has no application to the question under consideration, because it is proceeded upon the jurisdiction of a right given impliedly by the terms of a treaty.* . . . To apply the rule of international or foreign extradition, as announced in [*Rauscher*] to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty, contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion. . . In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supremacy clause of the land.

Id. at 545-46 (emphasis added).[29]

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[29]The government has also pointed to cases purportedly holding that precluding the defendant's prosecution is never the appropriate remedy. (Pet. Br. 16-17). Again, however, its misapplication of and unjustified extrapolation from case law is manifest. In those cases, the Court found that alternative means of redress -- such as evidentiary exclusion or the imposition of civil or criminal liability -- would provide an adequate remedy for the offense, typically an illegal arrest in violation of the Fourth Amendment. In contrast, violations of a treaty that recognizes limitations on each signatory nation's territorial reach and on its right to try a defendant residing in the other country directly affect the jurisdiction of the court. This can only be remedied by repatriation. Moreover, to preclude the defendant's prosecution in typical cases of unlawful arrest or interstate abduction would be a pointless exercise. *See, e.g., New York v. Harris*, 495 U.S. ___, 109 L.Ed.2d 13, 20 (1990) (noting that the defendant could be "immediately rearrested if momentarily released,"); *Verdugo-Urquidez*, 939 F.2d at 1347 (in cases of interstate abduction, because each state must deliver fugitives to the requesting state, *see* 18 U.S.C. § 3182, to send a suspect back would constitute "an exercise in futility"); *see also Lascelles*, 148 U.S. at 546 (noting that it would be "baseless and idle" for a state to return the suspect back to one state only to see him reappear); *Ker, supra*, (because the treaty at issue did not give the requested party the option of prosecuting the subject itself, the United States would have been entitled to obtain his surrender, and "two more trips across the sea would be the outcome to Ker of this extraordinary venture." (Brief for Defendant in Error, at 17-19.))

C. Respondent Has Standing To Assert The Violation Of The Treaty To Challenge The District Court's Jurisdiction Over Him.

In arguing that Respondent lacks standing to raise the Treaty violation, the government misinterprets the law and ignores over a century of precedent. The threshold inquiry is whether the implied Treaty provision prohibiting unconsented government-sponsored abductions is self-executing, i.e., whether it creates judicially enforceable obligations. The government carefully avoids this question.

Yet the answer can be found in numerous cases in which this Court has assumed that extradition treaties, including their implicit terms, were self-executing. There is no valid reason for making a distinction between the implicit obligation not to try one who has been forcibly abducted by government agents in circumvention of a treaty and the implicit obligation not to try a person for unspecified offenses, held to be judicially enforceable in *Rauscher*. Both confer rights upon individuals. Both must be found to be self-executing.

Once this self-execution inquiry is properly addressed, it is apparent that Respondent has standing to raise the Treaty as a bar to these proceedings. For a provision to be self-executing, it must impose an obligation on the government that courts may apply immediately and directly at the behest of specific persons. If this standard has been met, an individual tried in violation of this particular provision by definition has standing to raise the issue.

1. The Treaty's Ban On Unilateral Abduction Of Mexican Nationals is Self-Executing.

In nearly two centuries of case law, this Court has repeatedly held that self-executing treaty provisions are

directly enforceable by the judiciary. In order to be deemed self-executing, a treaty must create obligations that are not contingent upon further legislative action, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); *Foster v. Neilson*, 27 U.S. (2 Pet. 253) 253 (1829); and that are intended to benefit the individual asserting a legal interest under them. *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

In so holding, this Court effectuated the clear understanding of the Framers as embodied in the Supremacy Clause. The Framers were well-aware that treaties often are drafted to confer benefits upon individuals as well as to create reciprocal obligations for the states parties. Securing effective and prompt domestic enforcement of treaty rights was a primary aim of the Supremacy Clause and Article III.[30] Rather than rely upon political action to secure state compliance with the treaties of the newly constituted nation, the Framers made treaties the supreme law of the land, binding on the federal

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[30]The Framers rejected a proposal to permit Congress to invalidate state legislation conflicting with the treaty obligations of the U.S., in favor of the Supremacy Clause, which directs the state judges to strike down such legislation in cases where the litigants plead and prove a conflict with a treaty. V Elliot, *Debates on the Adoption of the Federal Constitution*, 127-128, 192, 322 (1974 reprint). The delay and uncertainty of the political solution figured largely in this choice. *Id.* at 321 (Mr. Martin), 468 (Mr. Mason and Mr. Morris).

and state judiciaries alike.[31]

Applying this prior jurisprudence, the Court has long recognized extradition treaties as prototypical examples of self-executing treaties, regardless of whether the treaty itself provides measures for domestic enforcement, and regardless of whether the specific treaty term is implicit or explicit. *See Rauscher, supra; Valentine, supra; Johnson, supra*. In particular, the fact that a treaty covers relations between sovereigns has never been seen as a bar to its invocation by individuals and enforcement by courts. A contrary view would effectively read Article VI out of the

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[31] From an early date this Court has given effect to this choice. In *Ware, supra*, an individual British creditor successfully relied upon the 1783 Treaty of Peace to prevail against a debtor attempting to bar collection on the basis of a state statute that conflicted with the treaty terms. This was so despite the fact that in Great Britain treaties are not enforceable in the absence of implementing legislation adopted by Parliament. The members of the Court emphasized the effect of the Supremacy Clause in making article 4 of the Treaty of Peace directly enforceable. This principle was reiterated in *Foster*, where Chief Justice Marshall remarked that *some* treaties would not be self-executing, if the text indicated that the benefits were contingent upon further legislative action. Noting that in other countries, as under the Articles of Confederation, treaties were enforceable only on the basis of implementing legislation, Chief Justice Marshall emphasized that by virtue of the Supremacy Clause:

> In the United States *a different principle is established*. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.

27 U.S. at 314 (emphasis added).

Constitution for a treaty "is essentially a contract between two sovereign nations." *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979).[32]

This has been recognized by the Executive Branch as well. For example, in 1895, Secretary of State Gresham informed the German Ambassador that it was *not* the law in the United States that extradition treaties created "rights

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[32]Extradition treaties resemble treaties of friendship, commerce and navigation, and treaties concerning inheritance rights of aliens, in that they have a dual purpose of conferring rights upon individuals and creating reciprocal obligations and rights on the part of the contracting states. *Head Money Cases*, 112 U.S. at 598; *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Air France v. Saks, supra*; *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940); *Clark v. Allen*, 331 U.S. 503 (1947). This Court has never had difficulty in recognizing such treaties as being self-executing even though they are silent with respect to domestic remedies. The thrust of the government's argument (Pet. Br. 34-37) is that *no* treaties are self-executing. In fact, treaties are silent on domestic remedies because this is a matter governed by domestic law, *e.g.*, the Supremacy Clause.

This Court's approach in *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865 (1991), is instructive. The issue there was whether individuals have judicially enforceable "rights" derived from the Commerce Clause. The Court rejected the argument that the Commerce Clause "merely allocates power between the Federal and State Governments, and does not confer 'rights.'" 111 S.Ct. at 870. The *Dennis* Court referred to the Commerce Clause as a "self-executing limitation on the power of the States...." 111 S. Ct. at 870 (citing *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). It further noted in *Dennis* that the fact that the right at issue was implied under the Commerce Clause (which speaks literally only to the power of Congress) rather than being express did not diminish its status as a right or affect its enforceability. 111 S.Ct. at 871 n. 7.

only between the Governments concerned." Rather "[i]t has been the settled law of [the United States] that the exemption from such prosecution is so far a personal right that the extradited person may demand and obtain its judicial enforcement." IV Moore, *International Law Digest* 321 (1906).

The government's position cannot be reconciled with this extensive case law and historical background. Because there can be no serious dispute that extradition treaties routinely have been viewed as self-executing, the sole question is whether the implied right not to be tried following an unconsented to, government-sponsored abduction can somehow be distinguished from other treaty provisions. It cannot. In bargaining for the terms of extradition treaties, nations seek to promote cooperation in law enforcement while preserving their sovereignty and bestowing benefits to certain classes of persons.[33] The prohibition against unconsented to abductions, expressed both in Article 9 and the whole structure of the Treaty, evidences a clear intent to confer benefits upon individuals. It is, therefore, self-executing.

The government's attempt to dismiss *Rauscher*'s evident relevance in a footnote strains credulity. (Pet. Br. 35 n.30). In particular, there is no basis for the government's suggestion that whether a treaty term is self-executing might depend on the scope of the required remedy. (Pet.

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[33]For example, I.A. Shearer notes that in perhaps the earliest recorded treaty to include extradition measures, a treaty of peace between Rameses II of Egypt and the Hittite prince Hattusili III, c. 1280 B.C., the parties agreed that persons surrendered would be spared severe punishments such as mutilation and destruction of home and family. Shearer, EXTRADITION IN INTERNATIONAL LAW, 5-6 (1971).

STATEMENT OF INTEREST

The Minnesota Lawyers International Human Rights Committee ("Committee") was founded in 1983, and is a nonprofit organization of lawyers committed to the promotion and protection of human rights worldwide, including the right to be free from abduction, disappearance, and arbitrary arrest. The Committee is a community-based human rights organization of lawyers in Minnesota and other parts of the United States that works impartially to hold all governments to the rule of law. The Committee is governed by a Board of Directors, chaired by Louis H. Smith, Esq. The Executive Director of the Committee is Barbara A. Frey, Esq. The Committee regularly sends fact-finding delegations to foreign countries and assists various courts as *amicus curiae* in cases involving violations of international human rights law. The Committee has been involved in developing international standards for medico-legal investigation into extra-legal and summary executions wherever they may occur and the filing of habeas corpus petitions to seek relief for the detained and disappeared in other countries. The Committee has a specific interest in the present case as part of its promotion of the observance of international human rights standards and its ongoing opposition to government-sponsored kidnapping. The Committee has also sent several delegations to study human rights in Mexico and has promoted a U.S.-Mexico relationship with a particular focus on human rights.

SUMMARY OF ARGUMENT

The problem of government-sponsored forced disappearances has plagued countries of the Western Hemisphere for thirty years. In Argentina, Chile, El Salvador, Guatemala, Peru and many other countries, the breakdown of respect for the rule of law has resulted in kidnapping, torture, death, and other suffering for thousands of innocent persons. Because the government in these places has not respected the rule of law -- sometimes in the name of "fighting subversion" or "protecting" democracy -- rights and protections of all citizens have been

weakened. The United States, however, has advocated a system of justice that maintains the utmost respect for the rule of law over short-run goals and needs. The fight against the importation of illegal drugs and the lawlessness of those people who profit from such activities is of vital importance to the United States and other countries in the hemisphere. In that fight, however, the United States must not risk the degradation of the liberties it seeks to protect by circumventing the rule of law.

I. The Manner in which Respondent Humberto Alvarez-Machain was Kidnapped and Abducted to the United States Violates the 1980 Extradition Treaty between the United States and Mexico.

The 1980 Extradition Treaty between the United States and Mexico (the "1980 Extradition Treaty")[1] is designed to protect the sovereignty and territorial integrity of both countries. The extradition treaty is also intended to protect the rights of citizens of both Mexico and the United States when one country seeks to obtain custody of citizens from their homeland. The United States Congress and United States courts have recognized that an abduction which circumvents the protection of an extradition treaty, if sanctioned officially, is not just a kidnapping but also a direct affront to the sovereign jurisdiction of the other nation. The abduction of Alvarez-Machain violates the sovereignty and territorial integrity protections of the 1980 Extradition Treaty.

II. The Violation of the 1980 Extradition Treaty Deprives the District Court of Jurisdiction over the Defendant.

The U.S. Court of Appeals for the Ninth Circuit correctly held that as a result of the United States Government's abduction of Alvarez-Machain in violation of the 1980 Extradition Treaty

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[1] *See* Extradition Treaty Between the United States and United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5058, T.I.A.S. No. 9656, *entered into force* Jan. 25, 1980.

and the subsequent protests of the Mexican Government, the District Court could not exercise personal jurisdiction over the defendant. United States courts have established that courts cannot exercise criminal jurisdiction over persons detained as a result of treaty violations.

Alvarez-Machain has standing to assert violation of the 1980 Treaty as a bar to the District Court's jurisdiction as a result of the official protest by the Mexican Government. Furthermore, federal district courts, in administering and interpretating extradition treaties as the law of the land in the United States, have wide-ranging powers to question those elements necessary for the exercise of the court's jurisdiction, including raising the issue of the validity of the court's personal jurisdiction over a defendant. In addition, it cannot be said that the District Court impermissibly interfered with the Executive's conduct of foreign policy by examining the court's personal jurisdiction over Alvarez-Machain through the application of the terms and provisions of the 1980 Treaty. Simply put, this Court is competent to read and interpret extradition treaties and the exercise of that constitutional power does not involve any issue of separation of powers or potential to "embarrass" coordinate branches of government.

III. Customary International Law Mandates the Return of Defendant to Mexico as the Remedy to the Violation of the 1980 Extradition Treaty.

United States courts have long held that customary international law forms an integral part of United States domestic law. Whenever possible, United States courts interpret treaties and statutes to be consistent with the dictates of customary international law.

International law dictates that the remedy for state-sponsored abduction of another country's citizen in violation of an extradition treaty is the return of the citizen to his/her home country. This internationally recognized remedy will not harm the United States, but rather, will protect the rights of its own citizens.

ARGUMENT

I. The Manner in which Respondent Humberto Alvarez - Machain was Kidnapped and Abducted to the United States Violates the 1980 Treaty of Extradition between the United States and Mexico.

The kidnapping and abduction of Dr. Humberto Alvarez-Machain by agents paid by and under the direction of the Drug Enforcement Administration ("DEA") violate the provisions for extradition set forth in the 1980 Extradition Treaty. The 1980 Extradition Treaty is designed to protect the sovereignty and territorial integrity of both the United States and Mexico. The 1980 Extradition Treaty provides that access to each party's national territory may only be gained pursuant to the treaty. *See supra* note 1, Article 20(1). Treaty Article 4(1) defines the territorial jurisdiction of the contracting parties:

> For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

Id. at Art. 4(1).

Because the 1980 Extradition Treaty is inherently designed to protect the party's sovereignty, that sovereignty can be breached only in the manner expressly provided for in the Treaty. The 1980 Extradition Treaty sets forth the conditions under which either the United States or Mexico may request the extradition of a citizen from the domestic territory either sovereign state. Article 9 provides that within the territorial jurisdiction of a party, that party is not bound to deliver its own nationals. *See id.*, Article 9(1). The 1980 Extradition Treaty further creates a full set of procedures to be followed by a party requesting extradition of a citizen from the other country's territory. *See id.*, Article 10. In

addition, Article 11 provides for the provisional arrest and detention during a period of 10 days of a person in the case of urgency.

Furthermore, Article 14 of the 1980 Extradition Treaty provides that the decision of the territorial sovereign to extradite its national is final and that the surrender of the person sought is controlled by the laws of the territorial sovereign. *See id.* Article 14 ("(1) The Requested Party shall promptly communicate to the requesting Party its decision on the request for extradition . . . (3) If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested party. . . ."). The completeness of the 1980 Extradition Treaty's procedural provisions indicates that the United States and Mexico fully intended the treaty to provide the exclusive means whereby a party could act within the territorial jurisdiction of the other party to obtain custody of a national of that party.[2]

In the present case, the kidnapping and abduction of Alvarez-Machain from the sovereign territory of Mexico were carried out with the knowledge and active participation of the

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[2] As recently as 1985, Abraham Sofaer, the Legal Adviser of the State Department, was of the opinion that unilateral abductions by United States officials would violate the territorial sovereignty of other nations, stating:

> In general, I would say that seizures by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state and could violate local kidnapping laws. . . . Such acts might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.

Hearings on S. 1429 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1986). *See also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 Am. J. Int'l. L. 444, 449-50 (1990); John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1452-53 (1988) (discussing the testimony of Sofaer).

United States Government. The persons who kidnapped Alvarez-Machain were paid and instructed by DEA agents. Supervising directors of the DEA and possibly the United States Attorney General's Office had knowledge of and approved the kidnapping before it took place. This case does not involve a situation in which the United States received custody of a person as a result of "informal rendition" -- actions taken by others outside of the protections of an extradition treaty. Here, there was unilateral United States Government action to violate the 1980 Extradition Treaty with Mexico by kidnapping and removing a Mexican citizen to the United States without the consent of the Mexican Government. This type of covert abduction simply cannot be characterized as "informal rendition" but rather constitutes a violation of the 1980 Extradition Treaty.

Both Congress and the courts of the United States have recognized that extradition treaties provide protection of the territorial sovereignty of the contracting states. Congress has enacted legislation providing that the United States should employ the extradition treaty with Mexico to obtain jurisdiction over Mexican nationals from Mexican sovereign territory subject to judicial proceedings in federal district court. See 18 U.S.C. § 3184 (1988).[3]

Congress further provided for the protection of individuals extradited pursuant to Section 3184. Congress, in 18 U.S.C. Section 3192, established that:

> Whenever any person is delivered by a foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have the power to take all necessary measures for the transportation and safekeeping of such

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[3] For an example of a U.S. court implementing the terms of an extradition treaty using 18 U.S.C. § 3184, see *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984), *cited in INS v. Doherty*, ___ U.S. ___, 112 S. Ct. 719, 116 L.Ed.2d 823, 60 USLW 4085, 4087 (1992).

> accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States or of the militia thereof, as may be necessary for the safekeeping and protection of the accused.

18 U.S.C. § 3192 (1988).

In 1976, Congress expressly prohibited officers or employees of the United States from taking part in arrests of foreign nationals in the sovereign territory of foreign countries with respect to DEA activities. Following the decisions in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975), and *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), Congress adopted the Mansfield Amendment to the Foreign Assistance Act of 1961 which provided:

> [§ 481](c)(1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts.

22 U.S.C. § 2291(c) (Supp. 1990).

In its report on the Mansfield Amendment, the Senate Foreign Relations Committee wrote:

> In adopting this restriction, the Committee seeks to reconcile two important U.S. interests; motivating foreign governments to cooperate to the fullest degree in stopping drugs from reaching the U.S. and avoiding excessive U.S. intervention in the internal affairs of other nations. The range of actions carried out by U.S. narcotics agents overseas covers a wide spectrum -- from the innocuous

> (exchanging information and intelligence) to the clearly objectionable (actions involving the use of force and actions involving arrest of foreign nationals).
>
> It is the Committee's intent that "police action," as used in this provision, is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and actions involving the arrest of foreign nationals -- whether unilaterally (acting on their own) or as members of teams involving agents or officials of other foreign governments. And more broadly, it is the Committee's intent that the Drug Enforcement Administration and Chiefs of U.S. diplomatic missions overseas exercise special care to insure that U.S. narcotics agents overseas not engage in any types of actions in which there is a reasonable risk of embroiling the U.S. in the internal affairs of other countries by tending to lead them into situations involving the use of force or the arrest of foreign nationals.

Senate Comm. on Foreign Relations, Internal Security Assistance and Arms Expert Control Act, Report on S. 2662, S. Rep. No. 605, 94th Cong., 2d Sess. 55 (1976).

Congress revised the Mansfield Amendment in 1986, 22 U.S.C. § 2291(c)(1)-(6) (Supp. 1990), and again in 1989, 22 U.S.C. § 2291(c)(2), (Supp. 1990) but the intent of the original text remains intact. The 1986 revisions provided authorization for the Secretary of State to waive the prohibition on participation of U.S. officers in an arrest.[4] A 1989 revision provided that U.S. officers may be *present* for arrests of foreign nationals in the sovereign territory of a foreign country "with the approval of the United States chief of mission." 22 U.S.C. § 2291(c)(2) (Supp. 1990).

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[4] 22 U.S.C. § 2291(c)(2) (1989) (as it read from 1986 to 1989). *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l. L. 444, 478-80 (1990).

The clear intention of the Mansfield Amendment was to restrict the activity of United States officers in the arrest and transport of foreign citizens from the territory of other nations. There is no indication that Congress would approve of United States officers, namely DEA agents, hiring local agents to act as surrogates to carry out the arrest and transport of suspected criminals from foreign territories. Rather, Congress provided that jurisdiction over criminals be obtained through the procedures established in formal extradition treaties.

While Congress has not explicitly provided that abductions of foreign nationals from foreign territories by agents of the United States violate the sovereignty of the host country and contravene the provisions of extradition treaties, Congress has made clear that it is troubled by unilateral actions of U.S. narcotics agents which infringe on the sovereignty of other nations and that United States courts should, instead, obtain jurisdiction over foreign nationals from foreign territories in accordance with the provisions of extradition treaties.

The petitioner contends that the United States' direct involvement in the kidnapping of a Mexican citizen from the sovereign territory of Mexico does not violate the 1980 Extradition Treaty because such actions are not expressly covered by the treaty. The petitioner's assertion is not supported by provisions of the treaty, United States law, or decisions of United States courts interpreting extradition treaties.

The United States Court of Appeals for the Ninth Circuit correctly rejected the petitioner's argument. United States courts, interpreting the protections offered by treaties, have concluded that jurisdiction of United States courts over foreign nationals for crimes committed outside of the United States is not simply a reflection of power over the person, rather it is a right governed by extradition treaties within the bounds of respect for the sovereign territories of the treaty participants. This Court, in *United States v. Rauscher*, 119 U.S. 407 (1886), recognized that extradition treaties are enacted to protect the interests of nations in the exercise of sovereign jurisdiction over their inhabitants even when faced with requests from other nations:

> Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation of one country to deliver up such fugitives to another: and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Id. at 411-12.

In *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220 (2d. Cir. 1934), the Second Circuit Court of Appeals similarly held that:

> Thus it is now clear that apart from a treaty a state has no duty to deliver up a person who has sought asylum within its boundaries. If the state wishes, it can afford him a refuge and protection from the state which he has fled. Of course, a state is under no duty to afford asylum to a fugitive; it may expel him from its territories if it chooses, and without complaint from the individual who is expelled. But it may grant to him an asylum, and, if such is done by it, no breach of international law is involved.

Id. at 222. United States courts have also recognized that an abduction which circumvents the provisions of an extradition treaty, if sanctioned officially, is not just a kidnapping but also a direct affront to the sovereign jurisdiction of the nation from which the individual is taken. In *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931), a case involving the extradition to Canada of an informant who, with an American narcotics agent, had abducted a person from Canada, the court noted:

> A person may be carried out of the country to answer for crime, however, only by the authority of the highest executive officials and in accordance with treaty

> provisions governing extradition. An unlawful arrest is merely an offense against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another state is a violation of the sovereignty of the former.

Id. at 19.

The petitioner relies on a number of recent opinions which acknowledge that regardless of the means a foreign country chooses to deliver an individual to the United States, the means of delivery does not bar U.S. courts from exercising personal jurisdiction over the delivered individual.[5] The petitioner attempts to conclude from these cases that the United States is therefore free to act outside of the provisions established by extradition treaties to gain custody of foreign nationals residing in the territory of a country with which a bilateral extradition treaty exists. This inverse implication is not supported by United States case law.[6]

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[5] *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (holding that where Thai immigration officials delivered a United States citizen to DEA agents, and Thailand did not protest the person's removal from Thailand, there was no violation of extradition treaty); *United States v. Cordero*, 668 F.2d 32, 38 (1st Cir. 1981) (holding that where Panama and Venezuela deported persons that were not citizens of those countries and did not protest the transfer of those persons to the United States, there was no violation of the extradition treaties between the United States and those countries); *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir. 1988) (holding that where Panamanian authorities arrested a person who was not a Panamanian citizen and delivered that person to DEA agents on a United States Air Force Base, and Panama did not protest the arrest and transfer, there was no violation of the extradition treaty).

[6] United States courts have long held that government actions which circumvent the manifest scope and purpose of extradition treaties providing for the exclusive manner of rendering fugitives among the signatory nations violate the treaty itself. *United States v. Rauscher*, 119 U.S. 407, 422, 430 (1886) (holding that a person could be tried only for an offense for which he had been extradited and on no other charge and failure of United States to abide by this principle violated the treaty, although the treaty contained no express provision prohibiting such an action); *Johnson v. Browne*, 205 U.S. 309 (1907) (holding

In *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987), the Eleventh Circuit Court of Appeals acknowledged that removal of a foreign national from a country which is party to an extradition treaty with the United States, accomplished by United States agents, would constitute a treaty violation. The *Jaffe* decision resulted from the kidnapping and removal by professional bounty hunters of a Canadian citizen to the United States for trial in Florida. *Id.* at 305-06. Canada brought a habeas corpus petition on behalf of the defendant claiming that the abduction was arranged by U.S. officials in violation of the Canada-United States extradition treaty.[7]

The Court of Appeals found that extradition treaties incorporate protection of the sovereign territory of the parties, noting that: "Under international law, as recognized in the United States, any nation has the right not to surrender fugitives, but instead to grant asylum. The function of extradition treaties is to create exceptions to this right of other nations." *Id.* at 306. The Jaffe court found that because the kidnapping was not carried out

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that it was an extradition treaty violation for the United States to imprison a person on a sentence imposed before he became a fugitive rather than trying him on the charge for which he was extradited, although the treaty did not expressly prohibit such an action). *Ford v. United States*, 273 U.S. 593 (1927) (U.S. Coast Guard seizure of vessel in area not contemplated by express language of treaty violated treaty); *Cook v. United States*, 288 U.S. 102, 121-22 (1933) (holding that "the Government itself lacked power to seize, since by the Treaty, it had imposed a territorial limitation upon its own authority" even though the United States actions did not violate express language in the treaty). *See also* John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1449-55 (1988) (arguing that under U.S. case law official kidnapping is not an acceptable alternative to extradition).

[7] Jaffe was incarcerated for a prior conviction but later allowed to post bond on a subsequent charge. After posting bond, Jaffe returned to Canada and failed to appear for trial on the later charge. The district court declined jurisdiction of the habeas corpus appeal because Jaffe had abused the writ and was a fugitive from justice, and indicated that if it did accept jurisdiction, it would dismiss the appeal on the merits. The Court of Appeals accepted an appeal to determine the issue of whether there had been a violation of the extradition treaty which would render the subsequent charges invalid. 825 F.2d at 306.

with involvement of the United States Government, the defendant could not assert the illegality of his abduction to defeat the jurisdiction of the court. However, the Court of Appeals noted that if the defendant could prove that "he was removed from the asylum state by governmental action, and therefore establish a treaty violation, she or he [could] object to trial in the United States." *Id.* at 307.

II. The Violation of the 1980 Treaty of Extradition Deprives the District Court of Personal Jurisdiction over the Respondent.

A. Respondent has standing to raise jurisdictional question.

International obligations do not ordinarily confer rights on individuals but rather on states. *See* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 902 (1987). For extradition treaties in the United States, however, the rule has always been different.[8] United States courts have generally allowed individuals to challenge violations of the extradition treaties under which the United States gained jurisdiction over the person.[9]

Recently some United States courts have held that a defendant is barred from asserting violation of an extradition treaty as a jurisdictional defense unless the country of the defendant who

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[8] *See generally* John Kester, *Some Myths of United States Extradition Law*, 76 Geo. L. J. 1441, 1465-66 (1988).

[9] *United States v. Rauscher*, 119 U.S. 407, 418-19 (1886) (holding that an extradition treaty is "the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of the treaty"); *see also Ford v. United States*, 273 U.S. 593 (1927) (individuals seized on high seas have standing to claim treaty rights); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (same); *Cook v. United States*, 288 U.S. 102, 121 (1933) (owners of vessels seized in violation of treaty have standing to invoke treaty rights).

has been abducted protests his/her removal in violation of an extradition treaty with the United States. Nonetheless, these decisions indicate that a properly registered protest by an extradition treaty party gives standing to the abducted person to raise the treaty violation as a defense to jurisdiction.

This principle of United States jurisprudence was most recently borne out in *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.) *cert. denied*, __ U.S. __, 111 S. Ct. 1640 (1990). The trial court addressed the standing of a defendant to raise violation of an extradition treaty as a defense to jurisdiction. The defendant in *Matta-Ballesteros* was arrested in Honduras by Honduran troops accompanied by U.S. Marshals and delivered to a United States Air Force Base. *Id.* at 256. The defendant claimed that a bill introduced in the Honduran legislature protesting his arrest and transfer constituted a protest by the Honduran people. *Id.* at 260. The *Matta-Ballesteros* court concluded that without an "official protest" from the Honduran Government, the defendant did not have standing to assert violation of an extradition treaty as a defense to jurisdiction.

In *Jaffe v. Smith*, 825 F.2d 304 (1987), the Eleventh Circuit Court of Appeals considered a challenge to the jurisdiction of the trial court over a defendant who had been kidnapped from Canada. Canada officially protested the abduction by sending several diplomatic notes to the United States State Department.[10]

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[10] Canada sent diplomatic notes protesting the abduction on November 5 and December 22, 1981; February 15, March 5 and October 13, 1982; and June 15, 1983. The protests were acknowledged by Secretary of State George Schultz who stated:

> As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.

Statement of George Schultz to the Florida Probation and Parole Commission, (July 22, 1983), *reprinted in* Marian Wash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l. L. 200, 207-08

The *Jaffe* court dismissed the defendant's challenge to the jurisdiction of the trial court, not because the defendant did not have standing to assert the treaty violation as a defense, but rather because the court found that the United States Government was not involved in the kidnapping. *Id.* at 306-07. The court indicated that if U.S. officials had been involved in the abduction, the defendant would have had standing to assert the extradition treaty violation as a defense to the trial court's jurisdiction.[11]

Here, the Mexican Government has clearly and manifestly protested the kidnapping and abduction of Alvarez-Machain as a violation of the 1980 Extradition Treaty between the United States and Mexico. The District Court ruled that the Mexican protest vested Alvarez-Machain with standing to assert his abduction in violation of the 1980 Extradition Treaty as a defense to the court's jurisdiction.

The petitioner argues that the Ninth Circuit Court of Appeals mistakenly held that Alvarez-Machain had standing to raise the United States' violation of the 1980 Extradition Treaty because the express terms of the treaty do not provide that a protest of a treaty party allows an individual standing to allege a treaty violation. The petitioner further argues that the question of whether an individual defendant has standing hinges on whether the extradition treaty is self-executing to the extent that it confers enforceable rights on individuals. The petitioner concludes that

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(1984).

[11] Other courts have indicated that an official protest by a party to an extradition treaty that one of its citizens was removed from the party's territory in violation of the treaty would give a defendant standing to assert violation of the treaty as a defense to jurisdiction. *See United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (holding that "absent protest or objection by the offended sovereign, [defendant] has no standing to raise violation of [extradition treaty]"); *Waits v. McGowan*, 516 F.2d 203, 208 & n.9 (3rd Cir. 1975) (holding "International extradition is governed only by considerations of comity and treaty provisions. . . . The protections and or rights which accrue to the extradited person primarily exist for the benefit of the asylum nation" and "[t]he pleadings do not allege that Canada has objected in any way to the removal of [defendant] to this country.").

because the treaty does not expressly provide for *individual* rights and protections, it cannot be self-executing to allow an individual standing to assert the rights and protections the extradition treaty creates for the treaty parties.

This argument is not supported by case law or by the inherent nature of extradition treaties. United States courts have repeatedly held that extradition treaties constitute exceptions to the generally recognized international principle that a nation has a right not to surrender its own citizens to a requesting nation. *See* discussion of case law in Section I above. To that end, extradition treaties provide certain rights and obligations for the benefit of the treaty parties. In exchange, the parties agree they will give up their right not to surrender their citizens in certain situations. While it is true that it is up to the sovereign parties themselves to assert their rights under the extradition treaty, those rights would be meaningless if, when the party sought to enforce its rights, the rights had no practical effect on the actions of the other party.[12]

B. The District Court rightly exercised its inherent power to review its personal jurisdiction over respondent.

In the constitutional system of the United States, federal courts have traditionally been responsible for ascertaining their own jurisdiction. *See Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 274 (1926) (holding that every court of

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[12] *See* The Head Money Cases (*Edye v. Robertson*), 112 U.S. 580, 598-99 (1884):

> "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."

Id.

general jurisdiction has power to determine whether the conditions essential to its exercise of jurisdiction exist); *Frissell v. Rizzo*, 597 F.2d 840, 843 (3rd Cir. 1979) (observing that "[o]nce the court finds Art. III, or 'pure' standing, it must then determine whether the claim is barred by nonconstitutional, prudent limitations on the exercise of its jurisdiction"). The supremacy clause of Article VI of the United States Constitution makes treaties of the United States the supreme law of the land subject to consideration by United States courts. In addition, Congress envisioned the involvement of federal courts in administration of extradition treaties and the application of treaty provisions to procure custody of foreign nationals residing in foreign territories. *See* 18 U.S.C. § 3184 (1988). Pursuant to this congressional grant of jurisdiction, U.S. courts have power to apply and interpret extradition treaties. *See, e.g. In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984), *cited in INS v. Doherty*, ___ U.S. ___, 112 S. Ct. 719, 116 L. Ed. 2d 823, 60 USLW 4085, 4087 (1992). For these reasons, the Ninth Circuit Court of Appeals rightly concluded that the District Court was justified, independent of the standing of the defendant to raise the issue, to inquire into its personal jurisdiction over the defendant when the defendant's presence before the court was by reason of violation of the 1980 extradition treaty.[13]

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[13] In addition, the District Court had the ability to review its personal jurisdiction over the defendant by reason of its supervisory powers. *See McNabb v. United States*, 318 U.S. 332, 345 (1943) (holding that courts may exercise supervisory power to avoid becoming "accomplices in willful disobedience of law"); *United States v. Toscanino*, 500 F.2d at 276 (holding that where a defendant has been brought into the United States in violation of a treaty, the court may exercise its supervisory power "to remedy abuses of a district court's process"); *United States v. Lira*, 515 F.2d at 73 (Oakes, J. dissenting) (warning that "these repeated abductions invit[e] exercise of that supervisory power in the interests of the greater good of preserving respect for law"); *Ahmad v. Wigen*, 726 F.Supp. 389, 412 (E.D.N.Y. 1989) (holding that "courts may not be parties to abusive judicial practices, even where sensitive foreign relations matters are concerned . . . courts are not, and cannot be, a rubber stamp . . . in the exercise of extradition jurisdiction"), *aff'd* 910 F.2d 1063 (2d Cir.), *stay denied*, __ U.S. __, 111 S. Ct. 23, 111 L.Ed.2d 835 (1990).

C. The District Court correctly held that it lacked personal jurisdiction over respondent.

The petitioner argues that *Ker v. Illinois*, 119 U.S. 436 (1886), and its progeny mandate that the District Court cannot question the manner in which the United States obtained custody of the defendant. The *Ker* doctrine provides that the power of a court to try a person for a crime is not impaired by the means by which that person has been brought within the court's jurisdiction.[14] The District Court correctly held that *Ker* is distinguishable from this case. In brief, in order not to repeat the detailed analysis of *Ker* adequately set forth in other briefs in support of Alvarez-Machain's position, *Ker* is distinguishable for three main reasons:

1. *Ker* was not an extradition case. In fact, *Ker* confirmed that if an extradition treaty is in force it does matter how custody is obtained.[15]

2. There was no United States Government involvement in the abduction. The U.S. Supreme Court took pains to emphasize that the kidnapper was acting "without any pretense of authority

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[14] 119 U.S. at 444; *see also Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

[15] *Ker*, 119 U.S. at 443-44; *see also Toscanino*, 500 F.2d at 278 (holding that "*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty.").

The seizure in *Ker* occurred following a Peruvian revolution; the existing extradition treaty could not be used because the courts and civil government were not functioning. *See* Charles Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l. L. 678, 686 (1953) (noting irrelevancy of treaty when foreign government willing to deliver).

under the treaty or from the government of the United States."[16]

3. There was no protest from the Government of Peru, the country from which the defendant in *Ker* was abducted. In fact, the government in power in Peru aided in the removal of the defendant, a United States citizen.[17]

United States courts have long held that courts cannot have criminal jurisdiction over persons detained as a result of treaty violations.[18] The Court of Appeals properly held that as a result of the abduction of Alvarez-Machain in violation of the 1980 Treaty and the protest of the Mexican Government, the *Ker-Frisbie* doctrine does not control.

D. The District Court's review of personal jurisdiction over the defendant does not involve a political question interfering with the Executive's conduct of foreign policy.

It is proper for this Court to address the issue of personal jurisdiction over the respondent under the power of the Court to

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[16] *Ker*, 119 U.S. at 443.

[17] *See* Fairman, *supra* note 15, at 685-86.

[18] *Rauscher*, 119 U.S. at 407, 419-20, 433 (holding that court had no jurisdiction to try defendant for crime other than one defendant was extradited for pursuant to treaty); *Cook v. United States*, 278 U.S. at 121-22 (holding that seizure of vessel in violation of a treaty deprived the court of jurisdiction); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (holding that jurisdiction cannot be based on custody obtained in violation of a treaty stating "'A decent respect for the opinions of mankind,' national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed – require that treaties shall not be reduced to mere 'scraps of paper.'").

interpret and apply provisions of the 1980 Extradition Treaty. Moreover, the jurisdictional review is proper in that it is not inquiring into some "political question," the determination of which would interfere with the Executive's conduct of foreign policy. Rather than interfere, the Court's inquiry into jurisdiction merely applies its inherent power of interpretation to the terms of the 1980 Extradition Treaty which the Executive purports to uphold as part of the laws of the United States. *See O'Connor v. United States*, 479 U.S. 27, 33-34 (1986) (Court considered course of conduct between parties and administration's application of the treaty as factors in the interpretation of a treaty provision); *Trans World Airline, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253-55 & n.26 (1984) (holding that "A treaty is in the nature of a contract between nations" and the interpretation of a treaty term "does not engage the 'political question' doctrine.").

To deem such an inquiry as "political" and inappropriate for the judiciary ignores a long line of precedent holding that "nonjusticability based on [a] 'political question' is *at best a limited* doctrine." See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis in the original), *cert. denied*, 470 U.S. 1003 (1985).

Modern case law on the political question doctrine derives from *Baker v. Carr*, 369 U.S. 186 (1962), which makes clear that the doctrine has only a limited use. In *Baker*, this Court held that the question whether a state legislative district apportionment plan violated the Constitution was not a political question and therefore was justiciable. In so holding, the Court rejected the notion that the doctrine rendered nonjusticiable all political cases, and instead observed that the nonjusticability of a question was "essentially a function of the separation of powers." *Baker*, 369 U.S. at 217. The Court then identified situations that might require application of the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable

> and manageable standards for resolving it; or the impossibility of deciding without anticipating determination of a kind clearly for nonjudicial indiscretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. Because the case at bar does not involve an issue of separation of powers, but rather the conduct of the Executive under a treaty, the rationale for invoking the political question doctrine is even weaker than the separation-of-powers rationale in *Baker*. In fact, the *Baker* opinion observes that the doctrine in no respect requires that all questions implicating foreign affairs be ruled political questions. *Baker*, 369 U.S. at 211.

Following *Baker*, U. S. courts have shown reluctance to apply the political question doctrine at all in matters involving the interpretation of extradition treaties. See, *e.g.*, *United States v. Doherty*, 786 F.2d 491, 492-93 (2nd Cir. 1986) *cited in INS v. Doherty*, *supra*, 60 USLW at 4087; *Quinn v. Robinson*, 783 F.2d 776, 790-791 (9th Cir. 1986); *In re Mackin*, 668 F.2d 122, 132-137 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504, 513-18 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

For instance, in *Eain*, the U.S. Government sought to keep the Seventh Circuit from reviewing the Executive's position on the extradition of a prisoner to Israel. Relying on *Baker*, the U.S. Government argued that the Seventh Circuit should abstain from reviewing extradition under the treaty at issue since there was potential embarrassment for the Executive if the court's reading of the treaty differed, and because there were "no judicially discoverable and manageable standards to guide the court's discretion." *Eain*, 641 F.2d at 515. The Seventh Circuit rejected this nonjusticiability argument noting that unless the Executive chooses to abrogate or otherwise terminate the subject

treaty, it should be available for review by the judiciary to adjudicate disputes. The Seventh Circuit could "construe [the] treaty and . . . find it provides the answer." *Eain*, 641 F.2d at 514 *quoting Baker*, 369 U.S. at 212.

The Seventh Circuit found the treaty issue justiciable even if its conclusions might differ with those of the Executive. "[T]he Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable 'political question.'" *Eain*, 641 F.2d at 515.[19] Finally, the court rejected the notion that there were no manageable standards with which to guide any inquiry into the matter of extradition. There was treaty language to interpret and courts have authority to construe treaties as they do other sources of United States law. See *Eain*, 641 F.2d at 515.

In re Mackin is similar to *Eain* and the case now at issue, since in *Mackin*, the U.S. Government told the Second Circuit that it lacked jurisdiction to review the political offense exception of the extradition treaty between the United States and Great Britain. The Second Circuit rejected this political question argument, insisting that the courts were as qualified as the Executive to apply the subject extradition treaty provisions upon review. *In re Mackin*, 668 F.2d at 132-134.

The Second Circuit reiterated the *Mackin* holding in *United States v. Doherty*, 786 F.2d at 493. The *Doherty* court, noting that the U.S. Government had abandoned its contention that the political offense exception of U.S. extradition treaties is

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[19] As the Seventh Circuit indicated in *Eain*, the judiciary has made numerous decisions that touch the nation's domestic and foreign policy concerns and implicate matters traditionally thought of as executive functions, sometimes to the chagrin of the Executive. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (permitting publication of Pentagon Papers in face of argument of threat to relations with allies); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (restricting executive discretion against claim of necessity to further international military policy). *See also Dennis v. United States*, 341 U.S. 494 (1951) (appraisal by court of international tensions and conditions in evaluating constitutionality of statute).

subject to interpretation solely by the Executive, upheld the extradition magistrate's denial of an extradition request based on the political offense exception. In *INS v. Doherty*, the Supreme Court observed that "[t]he attempts of the United States to attack [the extradition magistrate's] conclusion collaterally were rebuffed." *INS v. Doherty*, *supra*, 60 USLW at 4087.

In *Quinn*, the U.S. Government again argued unsuccessfully for a political question exception from judicial review of a prisoner's extradition proceeding. *Quinn*, 783 F.2d at 776. In *Quinn*, the Ninth Circuit rejected the government's political question argument. While recognizing the Executive's interest in matters "that touch on foreign policy," the court nonetheless chose to review the extradition treaty matter at issue because of the individual liberty concerns at stake. *Id.* at 788. The individual liberty interests in the case now before this Court -- liberty from government-sponsored abduction in violation of an extradition treaty -- are no less important than those in *Quinn* and require the same judicial review as exercised in *Quinn*.

From *Baker* through *Eain*, *Mackin*, *Quinn*, *Doherty* and other cases,[20] the progression of modern law on the subject of political question demonstrates the doctrine's inapplicability to the instant case. None of the situations listed in *Baker* apply to deprive this Court of the power to say what the law is regarding personal jurisdiction, or deprive it of the authority to interpret a valid extradition treaty.

First, the matter at bar does not involve the question of separation of powers, which most often is the basis for invoking the limited and narrow doctrine of political question. Instead, it

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[20] *See, e.g., Ahmad v. Wigen*, 726 F.Supp. 389, 412 (E.D.N.Y. 1989) ("Despite the fact that the executive branch has a constitutional duty and right to conduct foreign policy, and the legislative and executive branches together have the duty and right to enter into treaties for extradition, the courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction."); *see also, Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796-98 (D.C. Cir. 1984) (Edwards, J., concurring) (political question doctrine is a very limited basis for non-justiciability and does not bar review of a tort claim for damages consequent to terrorist activities).

involves the interpretation of the 1980 Extradition Treaty, which the DEA violated with apparent impunity. Second, the Executive has the power to terminate a treaty; but if not terminated, this Court, as well as the Executive, may examine the treaty to find an "answer" to the question put to it: whether violation of the 1980 Extradition Treaty mandates that the District Court refrain from exercising personal jurisdiction over the defendant. Because the 1980 Extradition Treaty has not been terminated, it is a proper subject for interpretation by the Court. See *Trans-World Airline, Inc. v. Franklin Mint Corp.*, 466 U.S. at 254 n.26 (an examination of whether the U.S. acted consistent with a treaty does not engage the political question doctrine). Third, judicial review of personal jurisdictional matters does not "embarrass" nor does it show disrespect to coordinate branches of government, which have chosen as a matter of law not to terminate the 1980 Extradition Treaty. As the Supreme Court noted in *Baker*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Similarly, it would be error to suppose that the so-called "political question" in the present case bars this Court from reviewing and determining the proper exercise of personal jurisdiction over Alvarez-Machain.

III. Customary International Law Mandates the Return of Respondent to Mexico as the Remedy to the Violation of the 1980 Treaty of Extradition.

Customary international law forms an important part of United States law. The Supreme Court established in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." More recently, the Supreme Court acknowledged the "frequently reiterated" principle that federal common law is necessarily informed by international law. *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

It is a well established rule that statutes and treaties be construed to be consistent with norms of customary international law unless Congress has clearly indicated its intent to renounce these norms. Chief Justice Marshall proclaimed that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64, 118 (1804). That pronouncement has given rise to the presumption that:

> An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States [only] if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.

American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 115(1)(a) (1987).

Courts, in applying that principle, have interpreted treaties and acts of Congress so as not to conflict with norms of customary international law. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (statute construed to be consistent with State Department regulations and "well-established rule of international law") (*cited* with approval in *Weinberger v. Rossi*, 456 U.S. 25, 32 (1981)).

Consideration of international law principles in construing extradition treaties is particularly appropriate because, as noted by the Supreme Court in *Rauscher*, "[i]t is . . . very clear that this treaty did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty." *Rauscher*, 119 U.S. at 420. For these reasons, the remedy adopted for the United States' abduction of

Alvarez-Machain in violation of the 1980 Extradition Treaty must comport with principles of international law.[21]

Customary international law dictates that the abduction of another country's citizen in violation of an extradition treaty shall be remedied by the return of the citizen to his/her home country. See American Law Institute, *Restatement (Third) of the Foreign Relations Law at the United States* § 901 R.N.3 (1987). A survey of incidents involving international abductions indicates that in analogous situations, abducted persons are returned to the nation which protests the infringement of its sovereignty.

For example, in *The Jacob-Salomon* case, (1935), described in Lawrence Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. Int'l. L. 502, 502-04 (1935), Mr. Jacob-Salomon, a Swiss citizen, was kidnapped from Basel, Switzerland, by two German nationals who drove him across the border into Germany, where he was promptly arrested by German police. Switzerland lodged a diplomatic protest, asserting that "the abductors acted with the connivance of official German agencies," that one of them was a Gestapo agent, and that German officials anticipated the abduction. Id. at 503. The German Government refused to release the kidnapped person, alleging "'no evidence has been found that German authorities participated. . . .'" *Id.* at 504. Thereafter, Germany and Switzerland agreed to submit to arbitration. But before the tribunal made any decision, Germany conceded and Salomon was returned to Switzerland. *See* Lawrence Preuss, *Settlement of the Jacob Kidnapping Case*, 30 Am. J. Int'l. L. 123 (1936). This case illustrates that where the sovereignty of a nation has been infringed by persons acting on behalf of and with the encouragement of a foreign government, the kidnapped person

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[21] To determine the customary practice of nations when a defendant has been abducted in violation of an extradition treaty, U.S. courts begin with the sources identified by the Supreme Court in *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820): "The law of nations . . . may be ascertained by consulting the works of jurists, writing professionally on public law, or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law."

must be returned to the territory of the national from where he was taken -- a matter to which even Nazi Germany agreed.

In the *Schnaebele* case, *described in* 3 Travers, *Le Droit Penal International* (Paris 1924) No. 1302, Mr. Schnaebele, a French police official, was lured into Germany by a letter from a German police official requesting a meeting and purporting to grant safe-conduct. After Schnaebele crossed the border, German police arrested and imprisoned him. After a protest by the French Government, Prince Bismarck ordered Schnaebele's release because of the official involvement in luring Schnaebele from France.

In *The Blair Case* (1876), described in Preuss, 30 Am. J. Int'l. L., *supra*, at 124 n.6, a British citizen had fled to the United States from Britain, but was forcibly returned to Great Britain by a private detective who apparently acted in complicity with officials. After a protest by the United States Government, Great Britain returned Mr. Blair to the United States. Clearly, therefore, the United States has in the past insisted on the customary rule of international law that persons abducted from the territory of a sovereign nation with the help or encouragement of a foreign government must be returned to the offended nation.

In re Jolis, 7 Int'l L. Rep. Annual Digest 191 (1933-1934), involved a judgment of a French criminal court of first instance (tribunal correctionnel) in 1933. The accused, a Belgian citizen, visited a cafe in a French village and after he had left, it was found that cash was missing from the cash drawer. The owner of the cafe, suspecting the accused, called in two village constables (gardes-champetres) and together with them pursued the accused until they caught up with him across the frontier. The policemen detained the accused and brought him back to France. The Belgian Government lodged an official protest with the French Government against the arrest effected in Belgium by the constables and demanded the return of the accused. The Court of Avesnes decided to release the accused on the following ground:

> The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was

> completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . and all that followed thereon must therefore be annulled.

Id. at 191.

Particularly instructive is the celebrated abduction of Adolf Eichmann. After the kidnapping in 1960 of Adolf Eichmann in Argentina by Israeli nationals, the U.N. Security Council adopted a resolution, supported by the United States, which stated in part: "The Security Council . . . declares that acts such as that under consideration . . . affect the sovereignty of a Member State . . ." and which further requested Israel to make "appropriate reparation." S.C. Res., 868th mtg., U.N. Doc. S/4349 (June 23, 1960). Subsequently, Argentina reached a settlement of the incident with Israel. This settlement was of significance to Israeli courts in sustaining their jurisdiction over Eichmann. *See Attorney General of the Government of Israel v. Eichmann* (1961), 36 Int'l. L. Rep. 18 (1968), *aff'd sub nom. Eichmann v. Attorney General* (1962), 36 Int'l. L. Rep. 277 (1968), where the District Court stated:

> Considerable importance attaches to this statement in the present case, in view of the settlement of the dispute between Argentina and Israel. Whatever we may think of the general legal problem, now that the Governments of Argentina and Israel have issued their joint communiqué of August 3, 1960, to the effect that both Governments have decided to regard as closed the "incident" whereby the sovereignty of Argentina was infringed, there certainly remains to the accused in this case no right to base himself on the "infringed sovereignty" of the State of Argentina. The indictment in this case was filed after Argentina had exonerated Israel of violation of her sovereignty and there was no longer any breach of international law. In these circumstances the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign State had waived.

Id. at 63. In the present case, there has been no such settlement and Mexico has not exonerated the United States of the violation of the extradition treaty.

Customary international law and practice dictates that where a nation has obtained jurisdiction over a defendant by reason of a state-sponsored abduction of the person from his homeland in violation of an extradition treaty and the sovereignty of another nation, the violation should be remedied by the return of the defendant. The United States will not suffer by the adoption of this standard, but rather will gain in the protection of the rights of its own citizens. The warning of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting), is still true today: "Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law."

CONCLUSION

The decision of the Ninth Circuit Court of Appeals holding that the District Court could not exercise personal jurisdiction over a defendant abducted from Mexico in violation of an extradition treaty and in the face of protest by the Mexican Government, should be affirmed.

Respectfully submitted,

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